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No. 929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

GULFPORT SHIPBUILDING CORPORATION
AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners,

v.

MAXIME VALLOT, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

In The

Supreme Court of the United States

October Term, 1964

Gulfport Shipbuilding Corporation

and

Texas Employers' Insurance Association,
Petitioners,

v.

Maxime Vallot, et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on July 21, 1964, and the denial of a Petition for Rehearing on September 24, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is printed in Appendix "A" hereto, *infra* p. 1a, and is reported in 334 F. 2d 358 (5th Cir., 1964). The Court of Appeals for the Fifth Circuit rendered an opinion and order denying a Petition for Rehearing on September 24, 1964 which is printed in Appendix "B" hereto, infra p. 2a

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 21, 1964, (p. 2a *infra*). The denial of a Petition for Rehearing was entered on September 24, 1964. (p. 5a infra) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1.

Does the limited scope of judicial review of the compensation order issued pursuant to the Longshoremen's & Harbor Workers' Compensation Act (33 U.S.C.A. 901, et seq.) permit a United States District Court to remand the order to the Deputy Commissioner solely "for further consideration" instead of passing upon it, when the order contains only a single question of law, the resolving of which would be dispositive of the appeal without the inconvenience and cost of piecemeal review and the denial of justice by attendant delay?

2.

Does the letter filed by Maxime Vallot with the office of the Deputy Commissioner, dated June 20, 1958, constitute a timely claim for compensation benefits under the Longshoremen's & Harbor Workers' Compensation Act contrary to the findings of fact contained in the formal order issued by the Deputy Commissioner?

STATEMENT

Maxime Vallot was a longshoreman employed by Gulfport Shipbuilding Corporation on September 6, 1957 when

he sustained personal injuries while working as an apprentice welder on board the SS KERMAC. On that date he slipped while working on the vessel with resulting injuries to his neck, chest, jaw and back. After alternately being disabled and performing work during the remainder of 1957, a work shortage developed, and he was laid off by reason of such shortage on April 14, 1958. Shortly thereafter, he was involved in an automobile accident on April 27, 1958.

During the year following the last payment of compensation (December 4, 1957), no formal claim for compensation was filed by Vallot. The Longshoremen's & Harbor Workers' Compensation Act requires that a timely claim must be filed within one year after the date of injury or the last payment of compensation, or the claim is forever barred. (33 U.S.C. § 913(a).) Vallot had received a letter from the Deputy Commissioner dated April 24, 1958 (R. 203) inquiring about his condition and disability, the last paragraph of the letter admonishing the claimant as follows:

> "Do not answer this letter unless you believe you may be due more benefits and compensation."

While some effort was made by Vallot in his testimony to indicate to the contrary at the Formal Hearing (R. 139), in reality no answer was ever made to the Deputy Commissioner's letter of April 24, 1958. Indeed, the United States Attorney, appearing for the Deputy Commissioner, readily conceded the point (R. 44).

The next communication which Vallot received from the Deputy Commissioner was a form letter (Form U S. 212) dated June 17, 1958 (R. 208), and its significance

is of such importance in this appeal that we are reproducing the relevant portions:

June 17, 1958

"NOTICE TO INJURED EMPLOYEE OF TERMINATION OF COMPENSATION PAYMENTS

"Dear Sir:

"Various reports which have been filed here by the Employer, the Insurance Carrier, and Attending Physicians show the following relative to your case:

X Injured 9-6-57 and disability began 9-6-57.

X You were paid for temporary total disability from 9-9-57 to 12-3-57 at $52.80 a week. (You worked 40 days during this period.)

X You returned to work on 12-4-57, at full earning power.

X You have no serious head or facial disfigurement, and no permanent disability from the injury for which you have not been paid compensation as shown above.

"If the facts in your case are as indicated above, you have received the amount of compensation payment to which you are entitled under the law, and the case will be closed in the files of this office.

"If the facts are not as indicated above, kindly advise this office by personal call or letter WITHIN TEN DAYS as to the actual facts, and your case will have further investigation.

"The right to compensation for disability is barred unless claim therefor is filed within one year after the injury or within one year after the date of the last payment of compensation, and any application for review of a compensation case must be filed with the Deputy Commissioner within one year after the date of the last payment of compensation or within one year after rejection of a claim.

Very truly yours,

/s/ C. D. Calbeck"

In reply to the foregoing form letter sent to the Plaintiff by Commissioner Calbeck, the Plaintiff sent the following letter (R. 203):

"1308 Waco Avenue
Port Arthur, Texas
June 20, 1958

"Dear Sir:

"In your last letter that I received from you stated that I was paid from Sept. 9-57 to Dec. 3-57. I would like to correct this error because I received only four checks. The first one was for two weeks which was $106, and the other three were for $53 a week. This is the only money that I have received from the insurance.

"I would also like to correct the error that said that I had returned to work on full earning power. I have worked in that period for only a few days, and I have been laid off from that company since the accident.

"I am still having trouble with the injured nerve in my neck that I received from the accident.

Very truly yours,

Maxime Vallot"

It was on the basis of the evidence heard at the Formal Hearing on August 14, 1962 and a consideration of the testimony forthcoming at such Hearing that the Deputy Commissioner entered his Formal Award including findings of facts on September 25, 1962 (R. 9-12). A formal claim for compensation, dated March 13, 1962, had been filed (R. 207), but such formal claim was obviously more than one year after the last payment of compensation (December 4, 1957) as required by 33 U.S.C. § 913(a) of the Longshoremen's & Harbor Workers' Compensation Act. This formal claim therefore plays no significant role in this controversy.

When the Deputy Commissioner considered all of the evidence presented to him at the Formal Hearing, the

question readily reduced itself to whether or not a timely claim had actually been filed. Unless the claim for compensation was determined to be legally filed within the one year time limitation of the Statute, the other aspects of the claim were not reached and remained moot. In view of the fact that it was only too apparent from a comparison of the June 17th and June 20th communications that the letter from the Deputy Commissioner dated April 24, 1958 had never been answered by Vallot, the question simply became whether an unsigned letter transmitted by the claimant (dated June 20, 1958) in response to a form letter (Form U.S. 212) sent by the Deputy Commissioner (dated June 17, 1958) could be construed to be a timely claim within the meaning of the Longshoremen's & Harbor Workers' Compensation Act.

The Deputy Commissioner concluded that no timely claim for compensation had been filed and based upon appropriate findings issued the following Formal Order (R. 12):

> "1. The unsigned letter from the Claimant, dated June 20, 1958, does not contain the language of a claim, nor does it constitute a valid claim for compensation within the meaning and intention of the Longshoremen's & Harbor Workers' Compensation Act.
>
> "2. The formal claim for compensation dated March 13, 1962 was not filed within one year after the date of last payment of compensation, and is therefore barred by operation of the statute of limitations, as provided by Section 13(a) of the Longshoremen's & Harbor Workers' Compensation Act."

The Formal Award of the Deputy Commissioner, entered September 25, 1962, was appealed from by the claimant, Maxime Vallot, to the United States District Court for the Eastern District of Texas, Beaumont Division, pursuant to 33 U.S.C. §921 of the Longshoremen's & Harbor Work-

ers' Compensation Act which provides for a compensation order being suspended or set aside when not in accordance with law. Suit was filed against Gulfport Shipbuilding Corporation, the Employer, the Texas Employers' Insurance Association, the Insurance Carrier, and against Deputy Commissioner C. D. Calbeck, and Assistant Deputy Commissioner Gerald B. Leavey in an effort to restrain the enforcement of the Compensation Award rendered and to set aside the Award as being contrary to law, without substantial support in the record and contrary to the applicable provisions of the Longshoremen's & Harbor Workers' Compensation Act (R. 18).

While normally it would be unnecessary to recite and relate the nature and contents of the various pleadings thereafter filed in this case, the uniqueness of what transpired requires it. Answer by the United States Attorney on behalf of the Defendant-Deputy Commissioner initially admitted the Plaintiff's allegations and thereafter prayed for the case to be remanded "for such order as may be justified by the evidence" (R. 29). A Motion for Summary Judgment was then filed by the Plaintiff's counsel with approval and concurrence by the United States Attorney acting on behalf of the Defendant-Deputy Commissioner on the basis that, while the facts were undisputed, the Deputy Commissioner had made a mistake and desired to hold a further hearing (R. 33). However, on February 25, 1963, the United States Attorney filed a separate undesignated pleading requesting that the Court disregard the approval and concurrence previously executed by the United States Attorney on behalf of the Defendant-Deputy Commissioner in connection with the Plaintiff's Motion for Summary Judgment (R. 44). The reasons for divorcing the Deputy Commissioner's position from that of the Plaintiff as the allegations reflect were that no additional hearing be-

fore the Deputy Commissioner was necessary, since the extent of disability of the Plaintiff was at no time ever passed upon in the original Formal Order, and that the unsigned letter of June 20, 1958, received from the Plaintiff by the Deputy Commissioner was, contrary to the Formal Award, a valid and timely filed claim within the meaning of the Longshoremen's & Harbor Workers' Compensation Act. The United States Attorney was willing to admit that a mistake was made and that the matter be remanded to the Deputy Commissioner for "proper action thereon".

In response to Plaintiff's Motion for Summary Judgment, Defendants filed an opposition to Plaintiff's Motion for Summary Judgment (R. 35) as well as a separate Defendants' Motion for Summary Judgment (R. 39) on the basis that the sole question before the District Court was one of law: Was the Formal Award issued by the Deputy Commissioner which denied the Plaintiff's claim for compensation one that was in accordance with law and supported by substantial evidence pursuant to the Longshoremen's & Harbor Workers' Compensation Act? Requests for hearings before the District Court were made by all parties on one or more occasions to no avail. There then ensued the order previously referred to, an Order to Remand issued by Judge Joe J. Fisher on May 2, 1963, wherein both motions for summary judgment were denied and the cause remanded to the Deputy Commissioner "for further consideration" (R. 46). The Defendants then filed a Motion for Hearing on the Order to Remand in order that all parties would have an opportunity to be heard on the law (R. 47). This Motion was overruled on May 7, 1963 (R. 50), following which the Defendants (Petitioners herein) filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit (R. 53).

Petitioners' appeal from the Order to Remand of the District Court was predicated on the grounds that the Order was appealable, could be viewed as final in substance despite its designation in form and that as a practical matter a prompt resolution of the point of law involved would avoid further extended litigation and expense, including another appeal. The Court of Appeals rendered its opinion on July 21, 1964, and held that the Order of the District Court was not subject to review by the Appellate Court. Petitioners thereafter prepared and filed a Petition for Rehearing which was denied on September 24, 1964.

REASONS FOR GRANTING THE WRIT

I.

The holding of the Court of Appeals that there is no final and appealable judgment which is subject to review by the Court predicated on 28 U.S.C.A. § 1291 must be viewed in all fairness as a somewhat wooden position. It tends to ignore the spirit of the Federal Rules of Civil Procedure which seeks to terminate litigation by resolving all justiciable issues in the most practicable manner. This is indeed a relatively simple case involving the validity of the Deputy Commissioner's formal order, fully capable of being ruled upon and resolved once and for all in its present posture, but requiring some practicality in approach, rather than indulging solely in a technical examination. To do otherwise is to drive this litigation into further extended legal proceedings only to have it reappear again on appeal at some future date with the Petitioners' position grossly compromised and prejudiced.

The spirit of such practicality is graphically spelled out in a recent decision of this Court, *Mabel Gillespie* v. *United*

States Steel Corporation, rendered on December 7, 1964. A copy of the opinion is printed as Appendix "C" hereto, *infra* p. ...., and is reported in 33 Law Week 4043.

Gillespie was a death action brought by the widow pursuant to the provisions of the Jones Act, 46 U.S.C.A. § 688, et seq., in which it was urged that the Death Act provisions of the Jones Act, as well as those of the Ohio Wrongful Death Statute and the Ohio Survival Statute were applicable. The Trial Court held that only the Jones Act applied and struck portions of the complaint pertaining to the Ohio statutes, as well as the eligibility of the brother and sisters of the deceased as proper beneficiaries under the Jones Act.

The widow immediately appealed to the Court of Appeals, and the respondent moved to dismiss the appeal on the ground that the ruling appealed from was not a "final" decision of the District Court as required by 28 U.S.C.A. § 1291. Additionally, a mandamus action was filed in the Court of Appeals commanding the District Judge to vacate his original order or, in the alternative, to render the order appealable within the provisions of 28 U.S.C.A. § 1292(b). Without deciding whether mandamus would have been appropriate, the Court of Appeals proceeded to determine the controversy "on the merits as though it were submitted on an appeal," and the Court felt that it was free to do so, since "its resolution of the merits did not prejudice Respondent in any way, because it sustained Respondent's contentions by denying the Petition for Mandamus and affirming the District Court's order." The widow made application for a writ of certiorari which was granted. 375 U.S. 962.

This Honorable Court rendered an opinion at length as to the statutory meaning of 28 U.S.C.A. § 1291. This Court pointed out that finality within the meaning of Sec. 1291 does not necessarily mean the last order possible to be

made in a case. If further accurately stated that finality within the meaning of Sec. 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, rendering it impossible to devise any fool-proof formula for resolving all marginal cases.

In view of the situation this Court held that the requirement of finality is to be given a "practical rather than a technical construction." The most important competing considerations to be looked to are the "inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." It is with reference to both of these equitable tests in the context of the sole issue to be resolved that we respectfully submit that a writ should be granted in this case.

If the basic question of what constitutes a timely claim for compensation benefits under the Longshoremen's & Harbor Workers' Compensation Act is not ruled upon now, there must, of necessity, be another appeal. The Deputy Commissioner has issued a formal order denying the employee's claim. It is either correct or incorrect in law and needs no "further consideration" by the Deputy Commissioner. His findings of fact are entitled to the benefit of all presumptions and inferences which support such orders under the Administrative Procedures Act. (5 U.S.C.A. 1001, et seq.) Furthermore, the danger of denying justice by delay is readily apparent from the point of view of all the litigants. Petitioners would have no reason to pursue another appeal if the District Court had reviewed the formal order of the Deputy Commissioner and ruled, all of which was pointed out to the Court of Appeals. If Petitioners are correct, the Deputy Commissioner's order stands. If the formal order is incorrect, the issue as to limitations

is resolved, and the claim can be processed without consideration of this factor.

II.

This Court examined the requirement of finality in its proper perspective in *Gillespie, supra,* viewing the litigation in terms of practicalities rather than technicalities. The authorities therein cited apply with equal cogency to this case, and we need not repeat them here. Yet the Court of Appeals whose opinion antedated *Gillespie,* summarily dismissed this appeal, despite the gross inequities resulting insofar as Petitioners are concerned. The problem is compounded when it is recognized that the Deputy Commissioner could not know what to do upon remand "for further consideration," and indeed the Deputy Commissioner actually has no power to act until the District Court reviews the formal order.

Both Petitioners and Respondents filed Motions for Summary Judgment in the District Court. The Petitioners urged that as a matter of law the formal order should be upheld; the Respondents urged that as a matter of law the order was erroneous. This posture of the case underscores the fact that all litigants viewed the issue before the District Court as solely one of law. In other words, it was a review of a ruling by the Deputy Commissioner which, in fact, granted summary judgment to the employer. The Deputy Commissioner's order was final and dispositive insofar as his jurisdiction was concerned. A review of the summary judgment procedure by the reviewing court designated by statute for an appeal is likewise final and dispositive. The District Court by statute was not a trial court, but solely a reviewing court, and the mere following of the procedures for review set forth in Sec. 921(a) of the Longshoremen's & Harbor Workers' Compensation Act should not befog this highly crucial fact.

With the District Court having before it on appeal a question of law and two diametrically opposed Motions for Summary Judgment, it could only hold for Petitioners and against Respondents, or against Petitioners and for Respondents, absent some basis for a remand which would clarify or result in the furnishing of additional information to assist the District Court in understanding the record and making its ruling. The following cases bear out this proposition, and a brief comment on each may be helpful to the Court:

LeBlanc v. *Henderson,* 264 F. 2d 946 (5th Cir., 1959)

Remanded by the Court because the factual basis for the compensation order was not clear and a more specific finding was needed for the Court's benefit.

Simmons v. *Andruzzi,* 222 F. Supp. 803 (E.D. Pa. 1962)

Remanded by the District Court because the Deputy Commissioner found several causes of death, and it was necessary to ascertain which one or ones, if any, was causally connected to the original injury in order that the Court might rule.

Dixie Sand & Gravel v. *Holland,* 255 F. 2d 304 (6th Cir., 1958)

Remanded by the District Court because there was an omission by the Deputy Commissioner of an essential finding of fact as to whether or not the death of the employee arose within the meaning of the Act, and such omission precluded an adequate review by the Court.

Vendemia v. *Cristaldi,* 221 F. 2d 103 (D.C. Cir., 1955)

Remanded by the District Court who was in need of

further views of the Deputy Commissioner on the facts as applied to the law in order to discharge its own responsibilities in reviewing the case.

Monrote v. *Britton,* 237 F. 2d 756 (D.C. Cir., 1956)

Remanded by the District Court because there were inadequate findings of fact by the Deputy Commissioner to show that the employer was liable. Judicial review of administrative action cannot rest on speculation upon findings upon which determination was made.

Cullember v. *O'Hearn,* 183 F. Supp. 594 (D.C. Md., 1960)

Remanded by the District Court to determine whether or not the Deputy Commissioner considered certain testimony in arriving at his findings of fact.

Upon reviewing the above authorities, it is apparent that every remand was for the clarification or obtaining of additional facts to assist the District Court in understanding the record and making its ruling. Turning now to the present case, the question arises: What additional facts are needed by the District Court to pass upon this question of law? The letters at issue are agreed upon by Petitioners and Respondents as to the communications of June 17, 1958, from the Deputy Commissioner, and June 20, 1958, from the claimant. The undersigned letter from the claimant, dated June 20, 1958, is specifically identified and referred to in the Deputy Commissioner's order.

What then is incomplete or in need of clarification for the benefit of the District Court in rendering its decision on the validity of the Deputy Commissioner's formal order? It would be inconceivable to assume that the Deputy Commis-

sioner is obligated to inject into the formal order findings of fact pertaining to disability, wage rate, scope of employment, etc., when he has concluded that there is no valid claim. Such issues automatically become moot when the Deputy Commissioner found that the unsigned letter from the claimant, dated June 20, 1958, did not constitute a valid claim for compensation within the meaning and intention of the Longshoremen's & Harbor Workers' Compensation Act. In truth, the Deputy Commissioner, after hearing all the evidence, rendered summary judgment on the question of law in favor of the employer and incorporated such ruling in his formal order. The employee then appealed to the District Court for a review of the compensation order on the point of law, the scope of which review is defined by statute.

III.

It is undisputed that this Appeal from the Formal Award issued by the Deputy Commissioner is pursuant to 33 U.S.C. § 921(a) of the Longshoremen's & Harbor Workers' Compensation Act. That being so, it is perhaps helpful to discuss the scope of review by a Court when an effort is made by the aggrieved party to suspend or set aside the Award through the institution of an appeal to the United States District Court in the district where the injury occurred.

The scope of judicial review is actually sharply limited, and the Order may not be suspended or set aside through injunction proceedings, unless it is not in accordance with law or it is unsupported by substantial evidence when viewing the record as a whole. The functions of the two tribunals which are involved in such proceedings, the United States Employees' Compensation Commission on the one hand, and the United States District Court on the other, distinctly differ. Each has, solely by force of the Act,

especial and limited jurisdiction, and it is significant in this case to examine the statutory duty of the District Court in reviewing the formal award issued by the Deputy Commissioner concerning the claim of Maxime Vallot.

The case of *Independent Pier Co., Et Al* v. *Norton,* 54 F. 2d 734 (3rd Cir., 1931) contains language which draws the clearcut distinction between the function of the two forums. In that opinion the Court stated as follows:

> "The Longshoremen's & Harbor Workers' Compensation Act is administered by the United States Employees' Compensation Commission acting on cases of injury through Deputy Commissioners having jurisdiction in their respective Districts.
>
> "The Commission is a tribunal with executive or administrative functions which involve to a certain extent the exercise of judicial powers. It is similar to many other tribunals created especially to administer some one law or system of laws, as the Post Office Department, Land Department, Veteran's Bureau, Immigration Board, Commissioner of Internal Revenue in reference to the National Prohibition Act. (Citing cases.) Findings of fact made by these tribunals are uniformly regarded as conclusive. Cases, supra. Even so, by some acts and expressly the Act here in question, jurisdiction to review and reverse a decision of the administrative tribunal is conferred upon the District Court in the appropriate District, if the decision 'is not in accordance with law'. Its jurisdiction does not extend to a review on the merits empowering the Court to arrive at a different judgment on the same facts but is limited to an inquiry and decision whether on the law and the facts the action of the tribunal is based upon an error of law or is wholly unsupported by the evidence or clearly arbitrary or capricious . . ."

In other words, the findings of fact of the Deputy Commissioner in a proceeding under the Longshoremen's &

Harbor Workers' Compensation Act are entitled to great weight, and these findings are not to be set aside if supported by the evidence and not inconsistent with the law, even though the basic facts from which the Deputy Commissioner drew his inference are undisputed rather than controverted. *Cardillo* v. *Liberty Mutual Insurance Company*, 330 U.S. 469, 91 L.Ed. 1028 (1947). In short, a United States District Court is without power under the Longshoremen's & Harbor Workers' Compensation Act to try and determine issues de novo by making new and independent findings based upon its own appraisal of the evidence. *Marshall* v. *Pletz*, 317 U.S. 383, 63 Sup. Ct. 284, 87 L. Ed. 348 (1943); *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 71 Sup. Ct. 470, 95 L. Ed. 483 (1951).

Many of the formal orders appealed from in cases involving the Longshoremen's & Harbor Workers' Compensation Act involve questions as to extent of disability, wage rate, the employee's status as a crew member or harbor worker, cause of injury and similar issues. Such questions may be hotly disputed before the Deputy Commissioner, and there may frequently be divergent testimony at the Formal Hearing. Among the factual questions upon which the Deputy Commissioner's decision and order ordinarily are final are:

Dependency, *South Chgo. Coal Co.* v. *Bassett*, 309 U.S. 251, 84 L. Ed. 732 (1939);

Marriage, *Turnbull* v. *Cyr*, 188 F. 2d 455 (9th Cir., 1951);

Divorce, *Walsh Stevedore Co.* v. *Henderson*, 203 F. 2d 501 (5th Cir., 1953);

Widowhood, *Freeman* v. *Pillsbury*, 172 F. 2d 321 (9th Cir., 1949);

Justifiable Marital Desertion, *Haddock, Ltd.* v. *Pillsbury*, 60 F. Supp. 806 (1945);

Suicide, *Del Vecchio* v. *Bowers,* 296 U.S. 287, 80 L. Ed. 231 (1935);

Timeliness of Notice of Injury, *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431 (2nd Cir., 1948); and

The Barring of a Claim by Time Limitation, *Marshall* v. *Pletz,* 317 U.S. 383, 63 Sup. Ct. 284, 87 L. Ed. 348 (1943);

Crescent Wharf & Warehouse Co. v. *Pillsbury,* 99 F. Supp. 596 (1951); see also

Great American Indem. Co. v. *Britton,* 179 F. 2d 60 (D.C. Cir. 1949).

Referring now to the claim made by Maxime Vallot and the subsequent Order of the Deputy Commissioner dated September 25, 1962, it will be seen that the relevant facts as to correspondence upon which a claim can be predicated are undisputed and that the sole question involved is their significance in law. The last payment of compensation paid voluntarily to Vallot was on December 4, 1957. Pursuant to the provisions of 33 U.S.C. § 913(a) of the Longshoremen's & Harbor Workers' Compensation Act the Plaintiff had one year in which to file a claim, or to December 4, 1958. Vallot received a letter of inquiry from the Deputy Commissioner on April 24, 1958 asking about his condition and disability, and the last paragraph of the letter advised that he need not respond unless he believed that he was due more benefits in the form of compensation. No response was ever received to this communication in the Office of the Deputy Commissioner, as a review and comparison of the letter of inquiry of April 24th and the two communications of June 17th and June 20th unquestionably reveal. It is significant once more to note that the United States Attorney representing the Deputy Commissioner reversed his original position in which he supported the Plaintiff on the relevant communications

and withdrew concurrence with the position taken by Plaintiff's counsel (R. 44). Instead, in this undesignated pleading, dated February 25, 1963, the Deputy Commissioner agrees with Defendants-Petitioners that the significant communication to be examined in determining whether or not a valid compensation claim of Vallot exists in law is that of June 20, 1958 (R. 203). The existence of the various written communications as facts is undisputed; the significance in law of these communications is clearly disputed. The sole question before the District Court thus was whether or not there is substantial evidence and valid law to support the Deputy Commissioner in his determination in the Formal Award of September 25, 1962 that Maxime Vallot did not file a timely claim within one year after the last payment of compensation.

When a party invokes 33 U.S.C. § 921(b) of the Longshoremen's & Harbor Workers' Compensation Act to appeal from a Formal Award, the actual burden to show lack of substantial evidence to support the Award issued by the Deputy Commissioner is upon such party seeking review of the Order before the United States District Court. *Southern Stevedoring Co.* v. *Henderson,* 175 F. 2d 863 (5th Cir., 1949); *Lumberman's Mut. Cas. Ins. Co.* v. *O'Keefe,* 117 F. Supp. 876 (D.C. N.Y. 1954); *United Fruit Co.* v. *Cardillo,* 104 F. Supp. 81 (D.C. N.Y. 1952). We respectfully submit that Vallot has not sustained such a burden in this case.

IV.

The clincher as to the gross inequities arising insofar as the employer is concerned in this case becomes glaringly apparent when consideration is given to what the Deputy Commissioner is actually empowered to do. The Act is explicit that a Deputy Commissioner is not authorized to

vacate or set aside a compensation order. (33 U.S.C., Sec. 921.) The Congress only gave the Deputy Commissioner authority to modify a compensation order after notice and hearing (33 U.S.C., Sec. 922), and there are limitations on this power. Section 22 reads as follows:

> "Section 22. Upon his own initiative, or upon the application of any party in interest; *on the ground of a change in conditions or because of a mistake in the determination of facts by the Deputy Commissioner, the Deputy Commissioner may, at any time prior to one year after the date of the last payment of compensation,* whether or not a compensation order has been issued, *or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 19,* and in accordance with such section *issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation* or award compensation. Such new order shall not affect any compensation previously paid. . . ." (Emphasis supplied.)

It should be stressed that Section 22 pertaining to modification operates at the Deputy Commissioner level and does not authorize the Deputy Commissioner to vacate an order under any circumstances but only to modify an existing order awarding compensation or to reinstate payments or award compensation by order where no order previously existed.

Contrarywise, only the District Court is authorized under the Longshoremen's and Harbor Workers' Compensation Act to vacate or set aside a compensation order. 33 U.S.C., Sec. 921(b) reads in part as follows:

> "(b) *If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings,* mandatory or

> otherwise, brought by any party in interest against the Deputy Commissioner making the order, *and instituted in the Federal District Court for the Judicial District in which the injury occurred. . . .*" (Emphasis supplied.)

Section 21(a) provides that any such proceedings under Section 21(b) for the suspension or setting aside of a compensation order shall be filed within thirty days after the compensation order has been entered.

In fact, Congress expressly provided that this was the only procedure by which a compensation order could be vacated or set aside, Section 21(d) of the Longshoremen's Act reading as follows:

> "*Proceedings* for *suspending, setting aside,* or enforcing *a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this Section and Section 18.*" (Emphasis supplied.)

Thus, Subdivision (d) of Section 21 expressly provides that the only proceeding by which a compensation order (here that is the order of September 25, 1962 which denied the claim) can be set aside or vacated, so far as is material here, is one in accordance with the procedure set out in Section 21, that is, by injunction proceedings, mandatory or otherwise, brought in the appropriate United States District Court.

In fact, the Deputy Commissioner does not even have authority to suspend one of his orders, much less vacate it completely, for this power was expressly given only to the United States District Court. This clear-cut distinction as to the respective powers of the Deputy Commissioner and the District Court is all important to a consideration of this case.

The compensation order issued by the Deputy Commissioner in this case is dated September 25, 1962. Within the thirty day period prescribed in Section 21(a) of the Act (33 U.S.C. 921(a)), the claimant timely appealed to the Federal District Court for a review of the formal order. At this point the Deputy Commissioner's jurisdiction was stayed, and the Federal District Court's review jurisdiction commenced. *Bassett* v. *Massman Construction Co.*, 120 F. 2d 230 (8th Cir. 1941) cert. den. 314 U.S. 648, 86 L. Ed. 520. The requirement that a proceeding to review a compensation order be instituted in the Federal District Court for the District in which the injury occurred is not merely one of venue but is jurisdictional. *Continental Fire & Casualty Insurance Company,* 236 F. 2d 282 (9th Cir. 1956); *Hughes* v. *Quigley,* 184 F. Supp. 568 (1960); *Atlantic Ship Rigging Co.* v. *McClellan,* 184 F. Supp. 569 (1960). A failure to institute proceedings in the Federal Court within thirty days after the filing of an award precludes jurisdiction. There was therefore nothing more that the Deputy Commissioner could do until the Federal District Court reviewed the formal order pursuant to 33 U.S.C., Section 921 and, if not in accordance with law, suspended or set the order aside through injunction proceedings. This required a specific ruling by the District Court.

The only other alternative open to a claimant if he was willing to forego an appeal to the District Court and remain at the Deputy Commissioner level was to apply for a modification of the order pursuant to Section 22 of the Act (33 U.S.C. 922). Such procedure would be before the Deputy Commissioner without any involvement of the District Court and, as the statute recites, permit redress involving less than a complete setting aside or vacating of the formal order. If the District Court, as in this case, now remands the claim "for further consideration", what is the

Deputy Commissioner to do? The Deputy Commissioner by statute has no authority to vacate or set aside such order, and as a carollary a proceeding to vacate or set aside a formal order which is exclusively delegated to the District Court by 33 U.S.C. 921(d) cannot be performed by the Deputy Commissioner. He simply has no such power. As has been pointed out earlier, the remanding of such orders to the Deputy Commissioner may only be made in connection with the clarification of such order for the benefit of the Court, but the Deputy Commissioner has no power to vacate or set aside his own order. Congress only gave such power to the District Court. The Court therefore has to rule, once it takes jurisdiction pursuant to 33 U.S.C. 921.

This distinction between the respective powers of the District Court and the Deputy Commissioner has been considered previously. The case is *Calbeck* v. *A. B. Suderman Steve. Co.*, 290 F. 2d 308 (5th Cir. 1961). In that case following the issuance of an award of compensation, the Deputy Commissioner attempted to issue a vacating compensation order upon application of the claimant. No notice had been given to the employer and insurance carrier of the action taken by the Deputy Commissioner in issuing such vacating compensation order. In view of the specific provisions of Section 22 of the Act pertaining to modification of compensation orders by the Deputy Commissioner, employer and insurance carrier appealed in order to enjoin the issuance of the vacating compensation order as contrary to 33 U.S.C. 921(b) of the Act. Judge Ben C. Connally at the District Court level recognized the attempted abuse of authority of the Deputy Commissioner and granted summary judgment to the employer. The relevant question for our purposes in the present case is simply the scope of power and authority of the Deputy Commissioner. The Deputy Commissioner cannot, under any circumstances,

vacate or set aside a compensation order or order denying compensation, as this authority is solely reserved to the District Court. (33 U.S.C. 921(d)). This means that the District Court cannot remand innocuously "for further consideration" and avoid its obligations to rule on the issues presented by the appeal under 33 U.S.C. 921. The District Court must rule one way or the other, and such order is appealable.

V.

At this juncture it is perhaps well to examine the element of "mistake" which has been stressed so heavily by Respondents in support of their position in the Circuit Court. The United States Attorney would argue that such procedure was proper and one which comports with the language of the Act, even though 33 U.S.C. 921(b) specifically recites that "if not in accordance with law, a compensation order may be suspended or set aside . . ." It takes but a moment's reflection to appreciate what chaos would exist in the law if such an arbitrary means of correction, modification or revision of compensation orders under the Longshoremen's & Harbor Workers' Compensation Act were construed to be proper.

Normally this Court would have limited knowledge of what precipitated such allegations of "mistake" in the pleadings, since the contents of the actual formal award would certainly not reflect any subsequent change of heart which the Deputy Commissioner conceivably might have experienced. However, such a contention by Respondents is readily thwarted when correspondence contained in the Deputy Commissioner's file is considered. Following the appeal to the District Court by the claimant, Maxime Vallot, on October 18, 1962, and after the District Court's "Order to Remand" of May 2, 1963 was entered, a letter

by Vallot's counsel was directed to Assistant Deputy Commissioner Gerald B. Leavey with copies to all parties including counsel of record requesting a reconsideration of the Deputy Commissioner's original order. The contents are as follows:

"WATSON AND SELMAN
Attorneys at Law
207 F & M Building
Beaumont, Texas
June 19, 1963

Alto V. Watson
William W. Selman
J. Melvin Franks

Office Phones
TE 3-5614
TE 3-1485

"Mr. Gerald B. Leavey
Assistant Deputy Commissioner
U. S. Department of Labor
Room 502, Post Office Building
Galveston, Texas

Re: 40-116
Maxime Vallot
D/A 9-6-57
Gulfport Shipbuilding Corp.

"Dear Mr. Leavey:

"The Texas Employers' Insurance Association has perfected an appeal from the judgment of the United States District Court which remanded the above matter to you for an Award.

"This Award must be corrected by September 25, 1963, one year from the date of its entry.

"It is evidently the purpose and intention of the insurance company to delay the effective date of the

Order of Remand until after the year has expired from the date of the Award from which the Award can be corrected.

"I shall appreciate it if you will enter a proper Award in this case. The purpose of entering the Award is to protect the client from a situation where the insurance company will appeal from the Order of the District Court remanding the case to you and delay the final action thereon until after the year has expired in which you can correct the Award. It is my conviction that you can correct this Award without regard to the status of the appeal. If I be in error in this and you enter an Award, the only effect of it will be to have it consolidated with the present proceeding so that everyone concerned will be fully protected.

"You will notice that a copy of this letter is being sent to the attorneys for the insurer and the United States Attorney.

Yours very truly,

WATSON AND SELMAN
By: /s/ ALTO WATSON
Alto V. Watson

AVW:bf

cc: Honorable Carl O. Bue, Jr.
877 San Jacinto Building
Houston 2, Texas

Honorable Wm. Wayne Justice
United States Attorney
Tyler, Texas

Honorable Bryan Blalock
Assistant U. S. Attorney
Beaumont, Texas"

It is to be noted that this letter of June 19, 1963, is written after the "Order to Remand" was rendered by the District Court on May 2, 1963. The prompt response of Assistant Deputy Commissioner Gerald B. Leavey dated

June 24, 1963, with copies to all parties including counsel of record, the Bureau of Employees' Compensation and the United States Department of Justice, Admiralty and Shipping Section, in Washington, D. C., is as follows:

"U. S. DEPARTMENT OF LABOR
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Eighth Compensation District
Room 502, Post Office Building
Galveston, Texas
June 24, 1963

Address Replies to:
The Deputy Commissioner
Refer to File No. .....

"Maxime Vallot vs. C. D. Calbeck et al, Civil No. 4677, U.S. Dist. Ct., East. Tex. (Injury, Sept. 6, 1957 — BEC File No. 40-116)

"Hon. Alto V. Watson
Watson and Selman
Attorneys at Law
207 F & M Building
Beaumont, Texas

"Dear Mr. Watson:

"Reference is made to your letter of June 19, 1963, requesting that an award be issued in this case prior to September 25, 1963, one year from the date of the issuance of the Order rejecting the claim.

"As an appeal has been perfected from the Order of the District Court remanding the case for further consideration it is our opinion that no further action should be taken in connection with the case until it has been considered on appeal. That is our usual procedure.

"The appeal will serve to prevent the running of any time limitation. Any subsequent change in the Compensation Order required by the Appellate Court can, and will, be properly taken care of.

"Under the circumstances we would prefer to leave the case in its present posture until the decision of the Circuit Court of Appeals has been rendered.

Very truly yours,

/s/ GERALD B. LEAVEY
GERALD B. LEAVEY
Assistant Deputy Commissioner

GBL/vtm

cc: Royston, Rayzor & Cook, Attorneys at Law,
Att: Hon. Carl O. Bue, Jr.

cc: Hon. William Wayne Justice, U.S. Attorney,
Tyler, Texas

cc: Hon. Bryan Blalock, Asst. U.S. Attorney,
Beaumont, Texas

cc: Counsel for Employees' Compensation,
Litigation Division, Washington, D. C.

cc: Mr. John D. McClellan, Jr., Asst. Dir.
LS/HW Program, B.E.C.

cc: U. S. Dept. of Justice, Admiralty and Shipping
Section, Washington 25, D. C."

While the pleadings filed by the United States Attorney allege a "mistake" on the part of the Deputy Commissioner and a presumed request by him that the matter be remanded to be rectified, the language of the letter of Assistant Deputy Commissioner Gerald B. Leavey, the Commissioner who conducted the formal hearing in this matter, evidences no such viewpoint. On the contrary, the usual procedure in such matters was being followed. As Mr. Leavey points out in his letter, "Under the circumstances we would prefer

to leave the case in its present posture until the decision of the Circuit Court of Appeals has been rendered."

A later letter dated July 9, 1963 from Assistant Deputy Commissioner Leavey to the Assistant United States Attorney at Beaumont with similar distribution which was precipitated by Petitioners' demand that the transcript of the formal hearing be forwarded to the Circuit Court reaffirms the considered view of the Office of the Deputy Commissioner in this District that the case be allowed to remain in its present posture until the decision of the Circuit Court of Appeals had been rendered.

"U. S. DEPARTMENT OF LABOR
Bureau of Employees' Compensation
Longshoremen's and Harbor Workers'
Compensation Act
Eighth Compensation District
Room 502, Post Office Building
Galveston, Texas
July 9, 1963

"Maxime Vallot vs. C. D. Calbeck et al, Civil No. 4677, U.S. Dist. Ct., East. Tex. (Injury, Sept. 6, 1957 — BEC File No. 40-116)

"Honorable Bryan Blalock
Assistant United States Attorney
Post Office Box 1510
Beaumont, Texas

"Dear Mr. Blalock:

"Mr. Carl Bue of the firm of Royston, Rayzor and Cook, Houston, has advised that you feel that a letter would be desirable from this office authorizing the for-

warding of the transcript of the official report of proceedings for use in connection with the appeal of the above styled case.

"Inasmuch as the appeal has now been perfected we have no objection to the forwarding of the transcript. As set forth in our letter of June 24, 1963 to Mr. Alto V. Watson, a copy of which was forwarded to your office, we are willing to allow the case to remain in its present posture until the decision of the Circuit Court of Appeals has been rendered.

"If this letter is not sufficient for your purposes please let us know what else you desire and we will endeavor to comply with it.

Very truly yours,

GERALD B. LEAVEY
Assistant Deputy Commissioner

GBL/vtm

cc: Royston, Rayzor & Cook, Attorneys at Law,
Att: Hon. Carl O. Bue, Jr.

cc: Hon. William Wayne Justice, U.S. Attorney,
Tyler, Texas

cc: Counsel for Employees' Compensation,
Litigation Division, Washington, D. C.

cc: Mr. John D. McClellan, Jr., Asst. Dir.
LS/HW Program. B.E.C.

cc: U. S. Dept. of Justice, Admiralty and Shipping
Section, Washington 25, D. C."

The question immediately arises as to what indeed motivated such contentions of "mistake" by Respondents, since the contents of the compensation order and the two subsequent letters from the office of the Deputy Commissioner in this District make it only too apparent that there has been no subsequent indication of reconsideration by the Deputy

Commissioner which would support the allegation of "mistake" following the issuance of the formal award. The answer is that the Bureau of Employees' Compensation in Washington did not wish to support the compensation order issued by its own Deputy Commissioner in this compensation district. Thus, contrary to the usual situation in such cases, there is now before this Court a case in which the United States Attorney, while nominally representing the Deputy Commissioner in this litigation, is actually representing the Bureau of Employees' Compensation in opposing the compensation order of its own Deputy Commissioner which was issued on September 25, 1962.

VI.

The statute governing the filing of a claim under the Longshoremen's & Harbor Workers' Compensation Act is as follows:

> "Section 913(a) — The right to compensation for disability under this Chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death the claim may be filed within one year after the date of the last payment . . ."

The test, as enunciated by the cases, is that a writing, even though informal, must disclose an intention to assert a right to compensation. *Employers' Liability Assurance Corporation* v. *Donovan*, 279 F. 2d 76 (5th Cir. 1960, cert. den. 364 U.S. 884). The case of *Travelers Insurance Co.* v. *Parker*, 40 F. Supp. 692 (E. D. Virginia, 1941) construed the letter of the claimant together with the correspondence from the Deputy Commissioner to which the claimant re-

plied, in determining whether or not the claimant's letter was a proper claim. Again, while no particular form of communication was required, the letter or notice to the Deputy Commissioner had to reasonably infer that a claim for compensation was being made. Thus, in ascertaining whether a claim has been filed in this suit, we must look to the contents of the letter of the Claimant (R. 203) in the light of the form letter of the Deputy Commissioner (R. 208). In order to assist the Court the form letter (U.S. Form 212) which the Commissioner mailed to the claimant is reproduced in material part as follows:

"June 17, 1958

"NOTICE TO INJURED EMPLOYEE OF TERMINATION OF COMPENSATION PAYMENTS

"Dear Sir:

"Various reports which have been filed here by the Employer, the Insurance Carrier, and Attending Physicians show the following relative to your case:

X Injured 9-6-57 and disability began 9-6-57.

X You were paid for temporary total disability from 9-9-57 to 12-3-57 at $52.80 a week. (You worked 40 days during this period.)

X You returned to work on 12-4-57, at full earning power.

X You have no serious head or facial disfigurement, and no permanent disability from the injury for which you have not been paid compensation as shown above.

"If the facts in your case are as indicated above, you have received the amount of compensation payment to which you are entitled under the law, and the case will be closed in the files of this office.

"If the facts are not as indicated above, kindly advise this office by personal call or letter WITHIN TEN DAYS as to the actual facts, and your case will have further investigation.

"The right to compensation for disability is barred unless claim therefor is filed within one year after the injury or within one year after the date of the last payment of compensation, and any application for review of a compensation case must be filed with the Deputy Commissioner within one year after the date of the last payment of compensation or within one year after rejection of a claim.

Very truly yours,

/s/ C. D. Calbeck"

In reply to the foregoing form letter sent to the Plaintiff by Commissioner Calbeck, the claimant wrote the following letter (R. 203):

"1308 Waco Avenue
Port Arthur, Texas
June 20, 1958

"Dear Sir:

"In your last letter that I received from you stated that I was paid from Sept. 9-57 to Dec. 3-57. I would like to correct this error because I received only four checks. The first one was for two weeks which was $106, and the other three were for $53 a week. This is the only money that I have received from the insurance.

"I would also like to correct the error that said that I had returned to work on full earning power. I have worked in that period for only a few days, and I have been laid off from that company since the accident.

"I am still having trouble with the injured nerve in my neck that I received from the accident.

Very truly yours,

Maxime Vallot"

This letter does not contain any language from which an intent to claim compensation can be fairly construed. The

first paragraph of the letter relates to the amount of compensation previously paid and is clearly addressed to that part of the form letter in the next to last paragraph which requests information from the Plaintiff in the event the facts are not as indicated so that the case might have further investigation. The first paragraph of the letter thus contains no claim or demand for compensation; it simply corrects the second item checked in the form letter as to the amount of compensation paid. This item was in fact incorrect as seen by the amended stipulation at the Formal Hearing, (R. 67 as amended R. 195), that Maxime Vallot had worked 55 days during this period.

The second paragraph of the claimant's letter is intended to correct the third item checked in the form letter sent by the Deputy Commissioner. The statement that the claimant had been laid off from the company since the accident is clearly explained by his testimony that he had been laid off due to a shortage of work by the company on April 14, 1958, although he was able to work at that time (R. 158). This paragraph contains no language which can be construed as a claim.

The last paragraph of the claimant's letter is addressed to the fourth item checked in the Deputy Commissioner's form letter in order to advise him of the situation regarding his neck. It does not claim disability or a right to compensation, but merely indicates that he is still having some trouble. This language at best can only be viewed as a desire by Vallot for possible medical treatment which, even if furnished, is not the equivalent and does not extend the period for filing compensation claims. *Marshall* v. *Pletz*, 317 U.S. 383, 63 Sup. Ct. 284, 87 L. Ed. 348 (1943).

It is patently apparent that Vallot does not address any of his comments to the last paragraph of the Deputy Commissioner's letter, which clearly alerts him to the fact that

he must file claim within one year of the last payment of compensation. The letter of the claimant can only be reasonably construed to be a reply to the next to last paragraph of the Deputy Commissioner's letter and thus conceivably a request for further investigation. It has long been held that a request for additional investigation does not constitute a claim. *Giamelli* v. *V. Rahtz,* 209 App. Div. 720, 205 N.Y.S. 346, 347, discussed and cited with approval in *Young* v. *Hoage,* 90 F. 2d 395 (D.C. Cir. 1937). In this case the employee wrote a letter to the Commissioner as follows:

> "I was employed by J. Rahtz, 303 E. Houston Street, and fell from the first story while hanging up a sign on June 9, '22, and I fractured the neck of the femur. I am now in the Metropolitan Hospital in Ward D. I wish you would please investigate it for me; please let me hear from you."

The Court held this letter did not constitute a claim within the meaning of the Act.

The last paragraph of the Deputy Commissioner's form letter clearly points out to Vallot that it is necessary for him to file a claim within one year from the date of the last payment of compensation. However, there is absolutely nothing in the letter which evidences an intent to file a claim or even suggests that the claimant considers that any compensation is due him. Any studied, fair and objective analysis of these various facts can only lead to the conclusion that the claimant's letter of June 20, 1958 does not constitute a claim within the meaning of the Longshoremen's and Harbor Worker's Compensation Act.

The holding of *Feeney* v. *Willard,* 129 F. Supp. 414 (S.D. N.Y. 1955) is applicable here:

> "On its face, the letter employs no terminology of claim or demand or notice of intention to proceed for

> compensation. It is merely a step in a preliminary investigation to determine whether or not such a claim might be filed. There is nothing in it to alert the compensation authorities to put in operation the machinery of processing claims, and apparently, they were not so alerted."

The letter of June 20, 1958 makes no demand for compensation, and the Deputy Commissioner obviously did not construe the communication as being a claim at the time. No notice of claim was issued to the employer or compensation carrier as required by Section 919(b) (R. 178, R. 188). The only notice which was ever received by the compensation carrier was the one issued pursuant to the claim actually filed in this matter on March 13, 1962, and this claim obviously was not timely.

VII.

While compensation acts are to be liberally construed in favor of claimants by a Deputy Commissioner, it would certainly be contrary to every known principle of law to view the contents of a Formal Order once issued by the Deputy Commissioner in a different light when it favors a claimant from that when it favors an employer. The broad discretion of the Deputy Commissioner by that time has been exercised, and the four corners of the Formal Order contain his Findings of Fact. The presumptions and inferences which flow in support of such an Order should benefit an employer in precisely the same way as they do an employee when the Award favors him. Court procedure should not be operated more liberally or more favorably for one party than the other. *McDonough* v. *Monohan,* 30 F. Supp. 315 (D.C. Me. 1939) recently cited in *DiConstorzo* v. *Willard,* 165 F. Supp. 533 at 539 (D.C. N.Y. 1958). See also *Lacomastic Corporation* v. *Parker,* 54 F. Supp. 138 (D.C. Md. 1944). To hold otherwise is to conclude that the employer, even when he prevails before the

Deputy Commissioner, does not prevail at all, nor does he share equally with employees the benefits accorded litigants under this body of law. Instead the employer is stripped of the benefits of the original Order including the presumptions and inferences in support of its validity, exposed to the payments of compensation and forced to appeal himself from such Award in order to get the very point of law presently before this Court up on appeal once more. However, at that time the burden is then on the employer to overturn the Formal Order, and courts may then summarily dismiss such efforts on the grounds that the Deputy Commissioner's Formal Order was supported by substantial evidence in the record. Such an unconscionable result cannot be the law, even when compensation acts are involved. The proper, just and equitable answer to this dilemma is for this Honorable Court to determine the controversy on the merits in its present posture, thereby terminating the litigation once and for all, and avoiding piecemeal litigation, delay and additional expense to all parties.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

E. D. Vickery

Carl O. Bue, Jr.

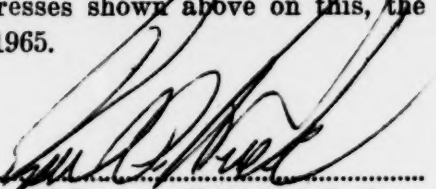
Attorneys for Petitioners

Of Counsel:

ROYSTON, RAYZOR & COOK
877 San Jacinto Building
Houston, Texas 77002
February 18, 1965

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Writ of Certiorari has been served on attorneys for the Respondents, Alto V. Watson, San Jacinto Building, Beaumont, Texas, and Alan S. Rosenthal and Richard S. Salzman, United States Department of Justice, Washington, D. C., 20530, by mailing copies thereof to the addresses shown above on this, the ...1... day of February, 1965.



.....
Of Royston, Rayzor & Cook

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20764

GULFPORT SHIPBUILDING CORPORATION AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Appellants,

versus

MAXIME VALLOT, ET AL,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

(July 21, 1964.)

Before HUTCHESON, PRETTYMAN* and JONES, Circuit Judges.

JONES, Circuit Judge: The appellee, Maxime Vallot, had been a longshoreman in the employ of the appellant, Gulfport Shipbuilding Corporation. During such employment, on September 6, 1957, Vallot sustained an injury while working as an apprentice welder on the SS KERMAC. As a result of the injury, Vallot was paid compensation for five weeks, the last payment being on December 4, 1957. On June 17, 1958, the Deputy Commissioner of the Labor Department's Bureau of Em-

* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

ployees Compensation sent Vallot a notice which stated, among other things the date of injury, the period for which compensation had been paid, and that Vallot had returned to work. The notice concluded with the following:

> "If the facts in your case are as indicated above, you have received the amount of compensation payment to which you are entitled under the law, and the case will be closed in the files of this office.
>
> "If the facts are not as indicated above, kindly advise this office by personal call or letter WITHIN TEN DAYS as to the actual facts, and your case will have further investigation.
>
> "The right to compensation for disability is barred unless claim therefor is filed within one year after the injury or within one year after the date of the last payment of compensation, and any application for review of a compensation case must be filed with the Deputy Commissioner within one year after the date of the last payment of compensation or within one year after rejection of a claim."

The one year limitation to which reference is made in the notice is prescribed by Section 13(a) of the Longshoremen's and Harbor Workers' Compensation Act.[1] The Deputy Commissioner received from Vallot a response dated June 20, 1958, in these words:

> "In your last letter that I received from you stated that I was paid from Sept. 9-57 to Dec. 3-57. I would like to correct this error because I received only four checks. The first one was for two weeks which was

[1] "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death the claim may be filed within one year after the date of the last payment." 33 U.S.C.A. § 913(a).

> $106, and the other three were for $53 a week. This is the only money that I have received from the insurance.
>
> "I would also like to correct the error that said that I had returned to work on full earning power. I have worked in that period for only a few days, and I have been laid off from that company since the accident.
>
> "I am still having trouble with the injured nerve in my neck that I received from the accident."

A formal claim was filed on March 13, 1962. The Deputy Commissioner held a hearing on Vallot's request for additional compensation and took testimony with respect to whether he was injured. Without passing on the merits of the claim, the Deputy Commission, by an order dated September 25, 1962, rejected it because it was not timely filed. In so doing the Deputy Commissioner held that the letter of June 20, 1958, did not meet statutory requirements to constitute a claim, and that the formal claim of March 16, 1962, was not timely filed. Vallot instituted an action against the employer, its compensation insurance carrier and the Deputy Commissioner, seeking injunctive relief under the statute[2] to set aside the Deputy Commissioner's order and to direct that an award of further compensation be entered. The employer and the insurer joined issue with Vallot by appropriate pleadings. Motions for summary judgment were filed by both plaintiff and defendants. The Deputy Commissioner initially joined in the plaintiff's motion. Thereafter, by leave of court, the Deputy Commissioner withdrew his concurrence in the plaintiff's motion and represented that a mistake had been made in the holding that the letter of June 20, 1958, did not constitute a valid claim which was timely filed. The court, by its order, denied

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[2] 33 U.S.C.A. § 921(b).

both motions for summary judgment and in the order it was provided that this cause be remanded to the Deputy Commissioner "for further consideration." The employer and insurer direct a notice of appeal to this order, contending for the correctness of the ruling of the Deputy Commissioner that Vallot's claim was barred by limitations.

The district court may, and in proper case it must, remand a claim under the Longshoremen's and Harbor Workers' Compensation Act to the Deputy Commissioner for his further action. *Le Blanc* v. *Henderson*, 5th Cir. 1959, 264 F. 2d 946. *Cf. Simmons* v. *Andruzzi*, D.C., E.D. Pa., 222 F. Supp. 803. This being so there is no final and appealable judgment which is subject to review by this Court. 28 U.S.C.A. § 1291. The appeal is

DISMISSED.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20764

GULFPORT SHIPBUILDING CORPORATION AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Appellants,

versus

MAXIME VALLOT, ET AL,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

(September 24, 1964)

ON PETITION FOR REHEARING

Before HUTCHESON, PRETTYMAN*, and JONES, Circuit Judges, PER CURIAM.

IT IS ORDERED That the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

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* Senior Circuit Judge of the District of Columbia Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1963

No. 20764

D. C. DOCKET No. 4677-CA

GULFPORT SHIPBUILDING CORPORATION AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Appellants,

versus

MAXIME VALLOT, ET AL,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

Before HUTCHESON, PRETTYMAN* and JONES,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause be and the same is hereby dismissed.

It is further ordered and adjudged by this Court that the appellants, Gulfport Shipbuilding Corporation and Texas Employers' Insurance Association, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 21, 1964

Issued as Mandate: OCT. 5, 1964

* Senior Circuit Judge of the D. C. Circuit, sitting by designation.

APPENDIX "C"

No. 10 — October Term, 1964.

Mabel Gillespie, Administratrix, etc., *Petitioner*, v. United States Steel Corporation.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 7, 1964.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, administratrix of the estate of her son Daniel Gillespie, brought this action in federal court against the respondent shipowner-employer to recover damages for Gillespie's death, which was alleged to have occurred when he fell and was drowned while working as a seaman on respondent's ship docked in Ohio. She claimed a right to recover for the benefit of herself and of the decedent's dependent brother and sisters under the Jones Act, which subjects employers to liability if by negligence they cause a seaman's injury or death.[1] She also claimed

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[1] 41 Stat. 1007, 46 U.S.C. § 688 (1958 ed.):

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

a right of recovery under the Ohio wrongful death statute[2] because the vessel allegedly was not seaworthy as required by the "general maritime law." The complaint in addition sought damages for Gillespie's pain and suffering before he died, based on the Jones Act and the general maritime law, causes of action which petitioner said survived Gillespie's death by force of the Jones Act itself and the Ohio survival statute,[3] respectively. The District Judge, holding that the Jones Act supplied the exclusive remedy, on motion of respondent struck all parts of the complaint which referred to the Ohio statutes or to unseaworthiness. He also struck all reference to recovery for the benefit of the brother and sisters of the decedent, who, respondent had argued, were not beneficiaries entitled to recovery under the Jones Act while their mother was living.

Petitioner immediately appealed to the Court of Appeals. Respondent moved to dismiss the appeal on the ground that the ruling appealed from was not a "final" decision of the District Court as required by 28 U. S. C. § 1291.[4] Thereupon petitioner administratrix, this time joined by the brother and sisters, filed in the Court of Appeals a petition for mandamus or other appropriate writ commanding the District Judge to vacate his original order and enter a new one either denying the motion to strike or in the alternative granting the motion but including also "the requisite written statement to effectively render his said order appealable within the provisions of 28 U. S. C. A. § 1292(b)," a statute providing for appeal of certain inter-

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[2] Ohio Rev Code § 2125.01.

[3] Ohio Rev. Code § 2305.21.

[4] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

locutory orders.[5] Without definitely deciding whether mandamus would have been appropriate in this case or deciding the "close" question of appealability, the Court of Appeals proceeded to determine the controversy "on the merits as though it were submitted on an appeal";[6] this the court said it felt free to do since its resolution of the merits did not prejudice respondent in any way, because it sustained respondent's contentions by denying the petition for mandamus and affirming the District Court's order.[7] 321 F. 2d 518. Petitioner brought the case here, and we granted certiorari. 375 U.S. 962.

I.

In this Court respondent joins petitioner in urging us to hold that 28 U. S. C. § 1291 does not require us to dismiss this case and that we can and should decide the validity of the District Court's order to strike. We agree. Under § 1291 an appeal may be taken from any "final" order of a district court. But as this Court often has pointed out, a decision "final" within the meaning of § 1291 does not

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[5] Section 1292 (b) provides:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[6] 321 F. 2d 518, 532.

[7] No review is sought in this Court of the denial of petition for mandamus.

necessarily mean the last order possible to be made in a case. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545. And our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is freqnently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. at 546. See also *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306; *Bronson* v. *Railroad Co.,* 2 Black 524, 531; *Forgay* v. *Conrad,* 6 How. 201, 203. *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called "piecemeal"; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the

claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them, cf. *Dickinson* v. *Petroleum Conversion Corp.*, *supra*, there certainly is ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition for extraordinary relief. Cf. *Swift & Co. Packers* v. *Compania Colombiana del Caribe, S. A.*, 339 U.S. 684, 688-689; *Gumbel* v. *Pitkin*, 113 U.S. 545, 548. Furthermore, in *United States* v. *General Motors Corp.*, 323 U.S. 373, 377, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was "fundamental to the further conduct of the case." For these same reasons this Court reviewed such a ruling in *Land* v. *Dollar*, 330 U.S. 731, 734, n. 2, and *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3, where, as here, the case had not yet been fully tried. And see *Cohen* v. *Beneficial Industrial Loan Corp., supra*, 337 U.S., at 545-547. We think that the questions presented here are equally "fundamental to the further conduct of the case." It is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292(b), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 U. S. C. § 1291. We therefore proceed to consider the correctness of the Court of Appeals' judgment.

II.

In 1930 this Court held in *Lindgren* v. *United States*, 281 U.S. 38, that in passing § 33 of the Merchant Marine Act, 46 U.S.C. § 688, commonly called the Jones Act, Congress provided an exclusive right of action for the death of seamen killed in the course of their employment, superseding all state death statutes which might otherwise be applied to maritime deaths, and, since the Act gave recovery only for negligence, precluding any possible recovery based on a theory of unseaworthiness. A strong appeal is now made that we overrule *Lindgren* because it is said to be unfair and incongruous in the light of some of our later cases which have liberalized the rights of seamen and nonseamen to recover on a theory of unseaworthiness for injuries, though not for death.[8] No one of these cases, however, has cast doubt on the correctness of the interpretation of the Jones Act in *Lindgren*, based as it was on a careful study of the Act in the context of then-existing admiralty principles, decisions and statutes. The opinion in *Lindgren* particularly pointed out that prior to the Jones Act there had existed no federal right of action by statute or under the general maritime law to recover damages for wrongful death of a seaman,[9] though some of the States did by statute authorize a right of recovery which admiralty would enforce.[10] Congress, the *Lindgren* Court held, passed the Jones Act in order to give a uniform right of recovery for

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[8] See, *e. g.*, *The Tungus* v. *Skovgaard*, 358 U. S. 588, 595, n. 9; *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96.

[9] *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372; *The Harrisburg*, 119 U. S. 199; cf. *The Osceola*, 189 U. S. 158.

[10] *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; cf. *The Hamilton*, 207 U. S. 398.

the death of every seaman. "It is plain," the Court went on to say, "that the Merchant Marine Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supercedes the application of the death statutes of the several States." 281 U.S., at 44. Thirty-four years have passed since the *Lindgren* decision, and Congress has left the Jones Act to stand with the interpretation this Court gave it. The decision was a reasonable one then. It provided the same remedy for injury or death for all seamen, the remedy that was and is provided for railroad workers in the Employers' Liability Act.[11] Whatever may be this Court's special responsibility for fashioning rules in maritime affairs,[12] we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act.

Petitioner argues further that even if the only available remedy for death is under the Jones Act, the District Judge erred in refusing to hold that the Jones Act provides for damages for death for the benefit of the brother and sisters of the decedent as well as for the mother. Their right of recovery, if any, depends on § 1 of the FELA, 45 U.S.C. § 51, which provides that recovery of damages for death shall be:

> for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee . . . .

In *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U.S. 161, 163, this Court, speaking through Mr. Justice

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[11] 35 Stat. 65, as amended, 45 U. S. C. §§ 51-60 (1958 ed.).

[12] See *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20-21, and cases there cited.

Brandeis, held that this provision creates "three classes of possible beneficiaries. But the liability is in the alternative. It is to one of the three; not to the several classes collectively." We are asked to overrule this case so as to give a right of recovery for the benefit of all the members of all three classes in every case of death. Both courts below refused to do so, and we agree. It is enough to say that we adhere to the *Wells-Dickey* holding, among other reasons because we agree that this interpretation of the Act is plainly correct. Cf. *Poff* v. *Pennsylvania R. Co.*, 327 U.S. 399.

One other aspect of this case remains to be mentioned. The complaint sought to recover damages for the estate because "decedent suffered severe personal injuries which caused him excruciating pain and mental anguish prior to his death." Petitioner contends that the seaman's claim for pain and suffering survives his death and can be brought on a theory of unseaworthiness by force of the Ohio survival statute. The District Judge struck the reference to the Ohio survival statute from the complaint, and the Court of Appeals held that there was "no substantial basis, in this case," for a claim for pain and suffering prior to death. There is, of course, no doubt that the Jones Act through § 9 of the FELA, 45 U.S.C. § 59,[13] provides for survival after the death of the seaman of "any right of action given by this chapter," *i.e.*, of his claim based on a theory of negligence. And we may assume, as we have in

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[13] 36 Stat. 291, 45 U. S. S. § 59 (1958 ed.):

> "Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

the past,[14] that after death of the injured person a state survival statute can preserve the cause of action for unseaworthiness,[15] which would not survive under the general maritime law.[16] In holding that petitioner had not stated a claim entitling her to recovery for the decedent's pain and suffering the Court of Appeals relied on *The Corsair*, 145 U.S. 335, 348, a case brought in a federal court to recover damages under a Louisiana survival statute for alleged pain and suffering prior to death by drowning where there was an interval of "about ten minutes" between the accident and death. The Court held such damages could not be recovered there, saying:

> . . . there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable as a matter of law from it.

Plainly this Court did not hold in *The Corsair* that damages cannot ever be recovered for physical and mental pain suffered prior to death by drowning. The case held merely that the averments of the plaintiff there did not justify awarding such damages in an action under the Louisiana survival statute. The Court's language certainly did not preclude allowance of such damages in all circumstances under other laws, or even under the Louisiana statute in a case where pain and suffering were "not substantially contemporaneous with . . . death and inseparable as a matter

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[14] "Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430, n. 4. See also *Curtis* v. *A. Garcia y Cia.*, 241 F. 2d 30, 36-37 (C. A. 3d Cir.); *Holland* v. *Steag, Inc.*, 143 F. Supp. 203, 205-206 (D. C. D. Mass.).

[15] Cf. *Just* v. *Chambers*, 312 U. S. 383.

[16] *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 267.

of law from it." In this day of liberality in allowing amendment of pleadings to achieve the ends of justice,[17] the issue whether the decedent's estate could recover here for pain and suffering prior to death should not have been decided finally by the Court of Appeals on the basis of mere pleading. Therefore the question whether damages can be recovered for pain and suffering prior to death on the facts of this case will remain open. In all other respects the judgment of the Court of Appeals is

Affirmed.

[17] See Fed. R. Civ. P. 15; *Foman* v. *Davis*, 371 U. S. 178; *United States* v. *Hougham*, 364 U. S. 310; cf. *Conley* v. *Gibson*, 355 U. S. 41.

MR. JUSTICE HARLAN, dissenting.

I think that due regard for the "finality" rule governing the appellate jurisdiction of the courts of appeals requires that the judgment below be vacated and the case remanded to the Court of Appeals with instructions to dismiss the appeal because the decision of the District Court was not a "final" one, and hence not reviewable by the Court of Appeals at this stage of the litigation.

Petitioner sought to recover in this action upon two theories: negligence under the Jones Act and unseaworthiness under the general maritime law. The District Court dismissed the unseaworthiness claim in the complaint, and petitioner appealed. Although petitioner seemed to recognize that the order was not appealable,[1] the Court of Ap-

[1] After the appeal was filed, petitioner unsuccessfully sought a writ of mandamus to compel the District Court to certify its order to the Court of Appeals under 28 U. S. C. § 1292 (b), *ante*, pp. 2-3.

peals, overruling respondent's motion to dismiss for lack of jurisdiction, affirmed on the merits and this Court granted certiorari over respondent's showing that the Court of Appeals should not have entertained the appeal. The Court substantially affirms the judgment of the Court of Appeals and the parties are remanded to a trial on the merits, but only after they have incurred needless delay and expenses in consequence of the loose practices sanctioned by the Court of Appeals and in turn by this Court. This case thus presents a striking example of the vice inherent in a system which permits piecemeal litigation of the issues in a lawsuit, a vice which Congress in 28 U.S.C. § 1291 intended to avoid by limiting appeals to the courts of appeals[2] only from "final decisions" of the district courts, with exceptions not here relevant.[3]

Manifestly the decision of the District Court reviewed by the Court of Appeals lacked the essential quality of finality; it involved but interstitial rulings in an action not yet tried. The justifications given by the Court for tolerating the lower court's departure from the requirements of § 1291 are, with all respect, unsatisfactory.

1. The Court relies on the discretionary right of a district court to certify an interlocutory order to the court of appeals under § 1292(b) when the "order involves a con-

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[2] The jurisdictional defect in this case arises only from the lack of finality of the District Court's order. In *United States* v. *General Motors*, 323 U. S. 373, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, and *Land* v. *Dollar*, 330 U. S. 731, all cited in the majority opinion, *ante*, p. 5, the District Court had entered a final judgment, but the Court of Appeals reversed and remanded the case for further proceedings. Thus the finality question before this Court was simply whether it should review a nonfinal order of the Court of Appeals, which of course the Court clearly has authority to do under 28 U. S. C. § 1254 (1).

[3] See 28 U. S. C. § 1292 (1958 ed.).

trolling question of law," but the District Court in its discretion — and rightly it turns out — did not make such a certification in this case,[4] and the Court of Appeals, equally correctly in my judgment, refused to order it to do so. The fact that Congress has provided some flexibility in the final judgment rule hardly lends support to the Court's attempt to obviate jurisdictional restrictions whenever a court of appeals erroneously entertains a nonappealable order and hardship may result if the substantive questions are not then decided here.[5]

2. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, does not support a different result. As the Court in that case stated, § 1291 does not permit appeals from decisions "where they are but steps towards final judgment in which they will merge . . . [and are not] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate considera-

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[4] The purpose of § 1292 (b) was to permit a district judge, in his discretion, to obtain immediate review of an order which might control the further conduct of the case and which normally involves an unsettled question of law. Cf. 28 U. S. C. § 1254 (3). In this case the District Court's ruling was controlled by *Lindgren* v. *United States*, 281 U. S. 38, and the validity of that ruling could only be tested by having certiorari issue from this Court. In that posture, I think the District Court was quite right in not wanting to delay the litigation on the chance that this Court would re-evaluate its decision in *Lindgren*.

[5] Compare *Schlagenhauf* v. *Holder*, —— U. S. ——, ——. The presence of the brothers and sisters, *ante*, p. 4 of the Court's opinion, cannot somehow serve to make the District Court order final. They were parties only to the mandamus proceeding, Court's opinion *ante*, pp. 2, 3, n. 7, their claims were not severable from petitioner's, *id. ante*, p. 4, and the merit of their claims likewise depended on a holding that *Lindgren* was overruled, see n. 4, *supra*. I can see no "injustice" resulting to the brothers and sisters by delaying review of the order until after final judgment which is not also present with respect to petitioner.

tion be deferred until the whole case is adjudicated." 337 U.S., at 546. It is clear in this case that had petitioner proceeded to trial and won on her Jones Act claim, her asserted cause of action for unseaworthiness would have merged in the judgment. See *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316. Conversely, her claim would have been preserved for appeal had she lost on her Jones Act claim. Surely the assertion that petitioner is entitled to submit her unseaworthiness theory to the jury is not collateral to rights asserted in her action, so as to entitle her to an appeal before trial.

3. Finally, the Court's suggestion that "it seems clear now that . . . case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided," *ante*, p. 4, furnishes no excuse for avoidance of the finality rule. Essentially such a position would justify review here of any case decided by a court of appeals whenever this Court, as it did in this instance, erroneously grants certiorari and permits counsel to brief and argue the case on the merits. That, I believe, is neither good law nor sound judicial administration.[6]

I would vacate the judgment of the Court of Appeals and remand the case to that court with directions to dismiss petitioner's appeal for lack of jurisdiction.

Memorandum of MR. JUSTICE STEWART.

While I agree with MR. JUSTICE HARLAN that this case is not properly here, the Court holds otherwise and decides

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[6] Understandably counsel for the respondent, as he explained in oral argument, did not brief the finality point following the grant of certiorari; he assumed that the granting of the petition, despite his having raised the matter in his esponse thereto, indicated that the Court had no interest in the question.

the issues presented on their merits. As to those issues, I join the opinion of the Court.

MR. JUSTICE GOLDBERG, dissenting in part.

I agree that this case is properly here, but disagree with the Court on the merits of the basic question presented for decision.

The precise point at issue in this case is whether a suit in a federal court for the death of a seaman resulting from unseaworthiness of a vessel may be maintained against the employer where the death occurs within the waters of a State which provides a statutory remedy for wrongful death.

In deciding this question, the Court today preserves an anomaly in admiralty law which has neither reason nor justification. A seaman who is either injured or killed while on the high seas is given a remedy for either negligence or unseaworthiness, *Mahnich* v. *Southern S. S. Co.*, 321 U.S. 96; *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 430, n. 4; a seaman who is injured in territorial waters may also sue either for negligence or unseaworthiness, *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221; cf. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85; an injured seaman may also sue for maintenance and cure and these claims survive his death; see *Kernan* v. *American Dredging Co.*, *supra*, at 430, n. 4; a nonseaman's death in territorial waters gives rise to an action based upon the applicable state wrongful death statute both for negligence and the general maritime doctrine of unseaworthiness; *The Tungus* v. *Skovgaard*, 358 U.S. 588. Only the family survivors of a seaman are left without a remedy for his death within ter-

ritorial waters caused by failure to maintain a seaworthy vessel. Only they are denied recourse to this rule of absolute liability and relegated to proof of negligence under the Jones Act. This disparity in treatment has been characterized by the lower federal courts as "deplorable," "anomalous," "archaic," "unnecessary," and "hard to understand." See *Fall* v. *Esso Standard Oil Co.*, 297 F. 2d 411, 417 (C.A. 5th Cir.) (Wisdom, J.); *Mortenson* v. *Pacific Far East Line, Inc.*, 148 F. Supp. 71, 73 (D.C. N.D. Cal.); *Gill* v. *United States*, 184 F. 2d 49, 57 (C.A 2d Cir.) (L. Hand, J., dissenting). I agree with these characterizations.

The Court relies upon *Lindgren* v. *United States*, 281 U.S. 38, and the doctrine of *stare decisis* to justify its holding — a holding which, in my view, is at variance with the general congressional intent in enacting the Jones Act "to provide liberal recovery for injured workers." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432. I do not feel that *stare decisis* compels the conclusion reached by the Court, because I believe, first, that the language of the Court in *Lindgren* is dictum and, second, that even if the language embodied a holding, such a holding should be overruled.

The precise issue before the Court in *Lindgren* was not whether a state wrongful death statute should be applied to supply a remedy for *unseaworthiness* — the issue here presented — but rather whether such a statute should be applied to supply a remedy for negligence.

The libel in *Lindgren*, the Court acknowledged, "does not allege the unseaworthiness of the vessel and is based upon negligence alone . . . ." 281 U.S., at 47.

The actual decision in *Lindgren* of precedential effect is that the Jones Act which provides a remedy for wrongful death due to negligence supersedes state remedies for

such negligence. With this precise holding there can be no quarrel. The Jones Act, 41 Stat. 1007, 46 U.S.C. § 688 (1958 ed.), says that "statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable" to seamen's cases. This Court has held that Congress intended that the Federal Employers Liability Act, 35 Stat. 65, as amended, 45 U.S.C. § 51 (1958 ed.), replace negligence and related state remedies. *New York Central R. Co.* v. *Winfield*, 244 U.S. 147. The Court in *Lindgren* reasonably concluded that the Jones Act, incorporating the standard of the FELA, supersedes and pre-empts state remedies for negligence. It correctly decided that since the wrongful death before it "was based upon negligence alone" recovery could only be had under the Jones Act and not under the state wrongful death statute. On this precise holding, *Lindgren* is a valid precedent and should be followed.

The Court in *Lindgren*, however, went on to say, at pp. 46-47:

> In the light of the foregoing decisions and in accordance with the principles therein announced we conclude that the Merchant Marine Act — adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act — establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of these instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.

> It results that in the present case no resort can be had to the Virginia Death Statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that Act.
>
> Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as herein above stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel.

It is apparent from this statement itself that the Court's observation that the Jones Act pre-empted state remedies for death resulting from unseaworthiness, as distinguished from negligence, was purely and simply *obiter dictum*. Cf. *The Tungus* v. *Skovgaard, supra,* at 606-607 (dissenting opinion of MR. JUSTICE BRENNAN). Even the English courts, which hold to a doctrine of *stare decisis* more rigid than our own, hold that *obiter dicta* are in no wise controlling.[1] Surely the rule of *stare decisis* should not preclude consideration of whether such dicta were originally supported by logic and have withstood the test of time.

In fact, much of the reasoning supporting the *Lindgren* dictum has been rejected in subsequent decisions of this Court. The Court's rationale in *Lindgren* for its conclusion that the Jones Act pre-empted remedies for wrongful death resulting from unseaworthiness, as well as negligence, was in part that the Act "covers the entire field of liability for

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[1] Corbett, The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied. 21 Wash. L. Rev. 158, 162.

injuries to seamen, it is paramount and exclusive." *Lindgren* v. *United States, supra,* at 47. In *Mahnich* v. *Southern S. S. Co., supra,* however, this Court held that a seaman may recover for injuries sustained from the ship's unseaworthiness notwithstanding his right to a remedy under the Jones Act for negligence. And in *Seas Shipping Co.* v. *Sieracki, supra,* the Court held that the same is true of longshoremen.[2] The logic of Judge Learned Hand's comment on the effect of these decisions on the rationale of the *Lindgren* dicta is inescapable:

> I find it hard to understand why the rationale of *Lindgren* v. *United States,* . . . ought not to have forbidden recovery in either of these instances. If the Jones Act "covers the entire field of liability for injuries to seamen" . . . and "is paramount and exclusive," why does it not supersede injuries arising from unseaworthiness which do not result in death, as well as those which do? [*Gill* v. *United States, supra,* at 57.]

There is, however, an answer to Judge Hand's question. The Court in *Lindgren* was wrong in its sweeping assertion that the Jones Act covers the *entire* field of liability for injuries to seamen and is paramount and exclusive. Congress in passing the Jones Act meant to leave certain pre-existing remedies untouched. And Congress did not intend in enacting the Jones Act — a remedial statute — to eliminate the seaman's right to recovery for maintenance

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[2] Moreover, federal courts have borrowed state survival statutes to allow for the survival of claims based upon unseaworthiness for conscious pain and suffering prior to the seaman's death. *Holland* v. *Steag, Inc.,* 143 F. Supp. 203 (D. C. D. Mass.) cited with approval in *Kernan* v. *American Dredging Co., supra,* at 430, n. 4; accord: *McLaughlin* v. *Blidberg Rothchild Co.,* 167 F. Supp. 714 (D. C. S. D. N. Y.); cf. *Just* v. *Chambers,* 312 U. S. 383. I see no way to hold under *Lindgren* that state survival statutes may be applied to preserve actions for pain and suffering, yet state wrongful death actions may not be used to allow an action for wrongful death.

and cure or for unseaworthiness. See *The Osceola,* 189 U.S. 158, 175. The admiralty rule that the vessel and owner are liable to the seamen for "injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in *The Osceola,*" 189 U.S. 158, 175. *Mahnich* v. *Southern S. S. Co., supra,* at 99.

What Congress did intend in enacting the Jones Act was to provide an additional remedy denied in maritime law, as ruled in *The Osceola, supra,* "by way of indemnity beyond maintenance and cure, for the injury to a seaman caused by the mere *negligence* of a ship's officer or member of the crew." *Ibid.* (Emphasis added.)

In other words, prior to the Jones Act, "the maritime law afforded no remedy . . . for . . . injury to a seaman caused by . . . negligence." *Ibid.* The Jones Act supplied a maritime remedy for *negligence*; it pre-empted those purely state remedies related to negligence and it is paramount and exclusive only to that extent.[3] The Act does not supersede, as *Mahnich* holds, traditional maritime remedies for unseaworthiness.

Traditional maritime law not only recognized the right of a seaman to recover for injuries caused by unseaworthiness. *The Osceola, supra,* at 175; it also recognized a right of action to recover for the death of a seaman resulting from unseaworthiness of a vessel where the death occurs in the navigable waters of a State which provides a

[3] Even if the analogy with FELA cases were followed exactly, *New York Central R. Co.* v. *Winfield, supra,* could require no more than pre-emption of *purely* state strict liability remedies. A wrongful death action based on unseaworthiness was a mixed state-federal remedy in which maritime courts borrowed a state wrongful death action which in turn was based upon a federal maritime standard of liability. Nothing in *Winfield* requires a finding that this type of remedy was pre-empted.

statutory remedy for wrongful death. This was recognized in the *Lindgren* opinion. 281 U.S., at 43. See also *Western Fuel Co.* v. *Garcia*, 257 U.S. 233, 242.

Simple logic compels the conclusion that if the Jones Act does not pre-empt a seaman's traditional remedy for injuries caused by unseaworthiness, it similarly does not pre-empt the right of action to recover for the death of a seaman resulting from unseaworthiness to the extent that such a remedy was recognized before the Jones Act in States providing a statutory remedy for wrongful death.

Legislative history as well as logic supports the conclusion that Congress by enacting the Jones Act did not intend to eliminate then existing remedies for unseaworthiness.

The same Congress which passed the Jones Act providing a remedy for injuries to a seaman resulting from negligence and a remedy for wrongful death caused by negligence where the death occurred in state waters, enacted the Death on the High Seas Act. 41 Stat. 537, 46 U. S. C. §§ 761-768 (1958 ed.). This statute gives an admiralty remedy for wrongful death to a seaman or other person occurring on the high seas beyond a marine league from the shore of any state. The Act expressly stipulates that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 41 Stat. 538, 46 U. S. C. § 767 (1958 ed.).

In *The Tungus* v. *Skovgaard, supra*, at 593, Mr. Justice Stewart for the Court said of this exception:

> The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave "unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States." S. Rep. No. 216, 66th Cong., 1st Sess.

3; H R. Rep. No. 574, 66th Cong., 2d Sess. 3. The record of debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59th Cong. Rec. 4482-4486.

From this expression of congressional purpose, the Court in *The Tungus* concluded that a suit in admiralty for death of a longshoreman resulting from unseaworthiness of a vessel may be maintained against the vessel's owner where the death occurs in the waters of a State which provides a statutory remedy for wrongful death.

It seems to me to strain credulity to impute the Congress the intent to eliminate state death remedies for unseaworthiness where the decedent is a seaman while refusing to do so in cases involving nonseamen. Yet this is the result of the Court's following *Lindgren*.

Finally, even though the *Lindgren* dictum has been in existence for 34 years, no policy of *stare decisis* militates against overruling *Lindgren*. In refusing to follow *Lindgren* we would not create new duties or standards of liability; we would merely allow a new remedy. Shipowners are currently required to maintain a seaworthy ship; seamen and longshoremen currently recover for death on the high seas and injury suffered anywhere due to an unseaworthy vessel. The action of a shipowner in maintaining his vessel will not be affected by now allowing recovery for wrongful death in territorial water caused by unseaworthiness. It is thus difficult to find much if any reliance that would justify the continuation of a legal anomaly which would deny a humane and justifiable remedy.

Stare decisis does not mean blind adherence to irrational doctrine. The very point of *stare decisis* is to produce a

sense of security in the working of the legal system by requiring the satisfaction of reasonable expectations. I should think that by allowing a remedy where one is needed, by eliminating differences not based on reason, while still leaving the underlying scheme of duties unchanged, this sense of security will not be weakened but strengthened. The policies behind *stare decisis* point toward ignoring *Lindgren*, not following it.

I cannot agree that Congress in enacting the Jones Act designed "to provide liberal recovery for injured workers" intended to create the anomaly perpetuated by the Court's decision. I would reverse and free the lower federal courts to grant relief in these cases — relief which many of them have indicated is just and proper "in terms of general principles," *Fall* v. *Esso Standard Oil Co., supra*, at 417, and which they gladly would accord but for the unfortunate and unnecessary compulsion of *Lindgren*.

Since petitioner claims that Ohio law allows recovery for a wrongful death caused by unseaworthiness, nothing in either the majority or minority opinion in *The Tungus* v. *Skovgaard, supra;* would preclude recovery. Only the *Lindgren* dictum stands in the way. I would reject this dictum and reverse.

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